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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DELL JOSEPH HERNANDEZ,

Defendant and Appellant.

E035019

(Super.Ct.No. RIF098802)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy J. Heaslet,
Judge. Affirmed as modified.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez,
Supervising Deputy Attorney General, and Lynne G. McGinnis, Deputy Attorney
General, for Plaintiff and Respondent.

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a)(1))¹ and found true the enhancement allegations that he committed the murder for the benefit of a criminal street gang (§ 188.22, subd. (b)(1)) and that he personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). Defendant was sentenced to a total term of 53 years to life in state prison as follows: an indeterminate term of 25 years to life for the murder, a consecutive term of 25 years to life for the firearm use enhancement, and a consecutive upper term of three years for the gang enhancement. On appeal, defendant contends (1) there was insufficient evidence to sustain the jury's true finding as to the criminal street gang enhancement; (2) the three-year consecutive term for the gang enhancement was unauthorized and must be replaced with a 15-year minimum parole eligibility requirement; and (3) he was deprived of his federal and state constitutional rights to a jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 when the trial court imposed the upper term on the gang enhancement without jury findings of aggravating circumstances. We reject defendant's first contention but agree that defendant's sentence should be modified to impose a 15-year minimum parole eligibility period pursuant to section 186.22, former subdivision (b)(4).²

¹ All future statutory references are to the Penal Code unless otherwise stated.

I

FACTUAL AND PROCEDURAL BACKGROUND

Sometime in 1995, Corona-based “Scarlet” street gang members went to the home of Armando S., a member of a gang known as “Devious Hoodlums” or “DH.” When Armando answered the door, Scarlet gang members shot him to death. Approximately a month later, DH members killed Scarlet gang member Victor P. in a drive-by shooting. DH continued to taunt Scarlet gang members by going to the homes of its members and firing gun shots into the air from the street.

Not wanting to lose face by allowing the acts of DH to go unavenged, the Scarlets waited for an opportune time to take action. That opportunity presented itself on the evening of November 7, 1999. Defendant (“Bomber II”), who was the sergeant-at-arms or “enforcer” of the Scarlets, was at a Scarlet hangout commonly known as the “Corner Pocket” drinking beer in an alley behind Art’s Liquor Store with fellow Scarlet gang members Gilbert R. and Michael B. when they saw a pickup truck go by down the alley. Defendant recognized the driver of the pickup truck, Javier A., as a DH gang member and said, “That’s DH.” Defendant then put the hood of his sweatshirt on his head, walked up the alley towards the liquor store, and waited by a pay phone while Javier entered the store to make a purchase. Meanwhile, fellow Scarlet gang members Gilbert and Michael went to some nearby apartments and watched defendant.

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² Because we find the three-year consecutive upper term for the gang enhancement was unauthorized and must instead be replaced with a 15-year minimum parole eligibility requirement, we need not address defendant’s remaining contention.

A few minutes later, Javier walked out the front door of the liquor store, and defendant followed him to his pickup truck. As Javier was opening the driver's side door, defendant walked in front of him, stopped, faced him, pulled out a revolver, and fired three or four shots. Javier screamed several times and fell to the ground. By the time paramedics arrived, Javier was dead; the cause of death was multiple gunshot wounds.

After defendant fired the fatal shots, he met up with Michael and Gilbert in the alley, and the three fled from the scene. As they ran Gilbert asked defendant for the gun. After defendant handed the gun to Gilbert, Gilbert wrapped it in his bandana. The three went to the home of fellow gang member Tommy M., where they wiped the gun to get rid of fingerprints, placed it in a box, and hid it under Tommy's bed. Another Scarlet gang member later either melted down the gun or tossed it into a river. Gilbert, Michael, and defendant placed defendant's clothes in a plastic bag; Tommy allowed defendant to use his shower to eliminate any blood, gunshot residue, or other physical evidence from his person. They all agreed on an alibi.

Jorge G., a Corona Varrio Locos gang member who witnessed the shooting, informed investigating officers that after he heard gunshots, he saw defendant, Gilbert, and a third Scarlet gang member running from Art's Liquor store. Gilbert had a gun and was trying to hide it in a bandana. According to Jorge, the trio met up with Tommy while they were still running. When they arrived at Tommy's house, they stood outside drinking beer.

The parties stipulated that (1) the Scarlet gang was a criminal street gang within the meaning of section 186.22; (2) the Scarlet gang had engaged in a “pattern of criminal gang activity” under that section; (3) the “primary activities” of the Scarlet gang were acts of gang violence, including murders, attempted murders, drive-by shootings and armed robberies; and (4) these crimes were the Scarlet gang’s “chief” or “principal” occupations.

The People’s gang expert, Corona Police Detective Daniel Bloomfield, testified that Hispanic gang members from Corona claimed allegiance to Corona Varrio Locos (CVL) and that the Scarlet gang was a subset of CVL. He further explained that Hispanic gang members from Corona did not get along with DH gang members because that gang originated in Orange County, and Hispanic gang members are turf oriented. He also stated that the Scarlet and DH gangs had been rivals since 1995, when Scarlet gang member Victor was killed in retaliation for DH gang member Armando’s murder the previous month; further, after the second killing, DH members went to the homes of Scarlet gang members and taunted the occupants by shooting guns in the air.

Detective Bloomfield explained that killing a rival gang member is an act that disrespects the entire rival gang; that the gang has to kill back to regain respect; and that once the retaliatory act is completed, the rival gang knows to stay away. In the present matter, Detective Bloomfield noted that the Scarlets waited four years to retaliate because they did not want to harm an innocent family member or any other innocent person; any victim had to be an active member of the DH gang. Detective Bloomfield opined that based on his training, experience, and familiarity with this case and the investigation

surrounding it, Javier was killed for the benefit of, at the direction of, or in association with the Scarlet criminal street gang. He explained that for a period of four years Victor's murder went unanswered and that the Scarlets' inaction was discussed among Corona gang members. However, in the gang world, payback is everything, and gang members have to maintain respect. Detective Bloomfield also pointed out that the shooting was done in association with and at the direction of the Scarlets because Scarlet gang members were the ones who committed the crime; that the shooting was done for the benefit of the Scarlets because it was payback for the "debt" of Victor's murder; and that the "payback" let everyone know that Scarlets were not afraid to kill and would avenge a "homie's" death, no matter how long it took. Detective Bloomfield further noted that Javier was shot at close range because the shooter wanted Javier to know who was about to kill him and why.

II

DISCUSSION

A. *Insufficiency of the Evidence Re: Gang Enhancement*

Defendant contends the evidence was insufficient to support the jury's true finding on the gang enhancement. (§ 186.22, subd. (b).) Defendant does not challenge the evidence establishing that he was a member of the gang known as the Scarlets, or that the gang was a criminal street gang, or that he committed the crime "for the benefit of, at the direction of, or in association with" his gang. (See § 186.22, subd. (b).) He instead claims that the evidence failed to show that he committed the crime "with the specific

intent to promote, further, or assist in any criminal conduct by gang members”
(§ 186.22, subd. (b)(1).)

Our review of any claim of insufficiency of the evidence is limited. “In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 and *People v. Parra* (1999) 70 Cal.App.4th 222, 225.) If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*Jackson v. Virginia* (1979) 443 U. S. 307, 319, 326; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1447; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) The standard of review applies even “when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

A gang enhancement under section 186.22, subdivision (b)(1) requires proof that (1) the defendant committed a felony; (2) the felony was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (3) the felony was committed with the specific intent to promote, further, or assist in any criminal conduct

by gang members. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207; § 186.22, subd. (b)(1).)

Here, the parties had stipulated that the Scarlets were a criminal street gang which engaged in a pattern of criminal gang activity and whose primary activities included murders, attempted murders, drive-by shootings and armed robberies. Corona Police Detective Daniel Bloomfield testified as the prosecution's gang expert. He was assigned to the City of Corona gang unit and his primary duties were to gather intelligence on criminal street gangs in the area, including the Scarlets; investigate possible gang activity; make contact with gang members; and learn who they are. The Hispanic gang members claim allegiance to CVL, and the Scarlets are a subset of CVL. Defendant was a documented member of the Scarlets with the moniker of Bomber II and was the gang's sergeant-at-arms or "enforcer."³ His role in the gang was to "administer discipline." Detective Bloomfield identified gang-related photographs seized from defendant's home.

In addition, Detective Bloomfield discussed the ongoing rivalry between the Scarlets and DH. Hispanic gang members from Corona did not get along with DH gang members because that gang originated in Orange County, and Hispanic gang members are turf oriented. The Scarlets and DHs had been rivals since 1995, when Scarlet gang member Victor was killed in retaliation for DH gang member Armando's murder. Thereafter, DH members went to the homes of Scarlet gang members and taunted the occupants by shooting guns into the air. Detective Bloomfield also explained that gang

members tend to be very macho, and respect is very important to them. Respect deals directly with fear, and greater respect means elevated rank, or greater fear means more power. Members lose respect if it becomes known that they have allowed anyone to show disrespect toward them. Gang members demand respect from other gang members as well as nongang members in the community. Detective Bloomfield opined that Javier was killed for the benefit of, in association with, and at the direction of the Scarlets based on the ongoing rivalry between the Scarlets and DH following the murder of Victor, the need for payback and respect in the gang world, and how the crime was committed (at close range and up front).

Gilbert corroborated much of Detective Bloomfield's testimony concerning defendant's role in the gang and the rivalry between the Scarlets and DH. Gilbert also testified that after defendant fired the fatal shots, defendant met up with Gilbert and Michael in the alley and that they then fled from the scene. As they ran, Gilbert concealed the gun in his bandana. When they arrived at the home of fellow Scarlet gang member Tommy, they wiped the gun to get rid of fingerprints, placed it in a box, and hid it under Tommy's bed. Another Scarlet gang member later melted down the gun or tossed it into a river. After Gilbert, Michael, and defendant placed defendant's clothes in a plastic bag, Tommy allowed defendant to use his shower to eliminate any blood, gunshot residue, or other physical evidence from his person. They all agreed on an alibi.

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³ Gilbert testified that defendant's job was that whatever happened, he would take care of it, i.e., if there was a fight with people from another area, defendant would jump into the fight.

Jorge, a CVL gang member who witnessed the shooting, corroborated part of Gilbert's testimony.

The above overwhelming evidence supports the jury's true finding on the gang enhancement allegation. (§ 186.22, subd. (b).) "[S]pecific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members . . .'" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Here, contrary to defendant's assertions, there was substantial evidence that defendant intended to commit the murder and that he intended to commit it to "promote, further, or assist any criminal conduct" by the Scarlets. Furthermore, substantial evidence showed that the murder defendant committed benefited the Scarlets.

This court's decision in *People v. Morales*, *supra*, 112 Cal.App.4th 1176 is illustrative. In that case, the defendant and fellow gang members robbed two victims, shooting and killing one. Given a hypothetical detailing the underlying facts, the prosecution's gang expert testified the crimes were committed for the benefit of, at the direction of, and/or in association with a criminal street gang. (*Id.* at p. 1197.) The gang expert explained that the three gang members acted together and did so because they could count on one another's loyalty and because the presence of multiple gang members was intimidating. (*Ibid.*) The gang expert also explained that the crimes would benefit individual gang members by earning them notoriety in their gang. Additionally, the gang would gain notoriety among rival gang members and the general public. (*Ibid.*) The jury returned true findings on the street gang enhancements; on appeal, the defendant, like defendant here, argued that there was insufficient evidence he had the specific intent to

promote or assist criminal conduct by gang members. (*Id.* at p. 1198) This court disagreed and concluded: “Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with [his codefendants], and that he knew that [his codefendants] were members of his gang. Moreover . . . there was sufficient evidence that defendant intended to aid and abet the robberies [his codefendants] actually committed. It was fairly inferable that he intended to assist criminal conduct by his fellow gang members.” (*Ibid.*) Likewise, it is reasonably inferable that defendant intended to assist criminal conduct by his fellow gang members. There was overwhelming evidence that defendant intended to commit the murder, that he intended to commit it in association with his fellow Scarlet gang members Gilbert and Michael, and that he knew Gilbert and Michael were members of his gang.

Defendant argues that *Morales* is distinguishable from the instant case. He notes that in that case the defendant was assisting a crime contemporaneously committed by other gang members, while here he was the one committing the crime. Defendant’s argument is illogical and was considered in *People v. Ngoun* (2001) 88 Cal.App.4th 432. In that case, the court considered whether a direct perpetrator of a gang crime is liable under section 186.22, subdivision (a)⁴ or whether the language “promotes, furthers, or assists” applies only to aiders and abettors. (*Ngoun*, at p. 434.) After reviewing dictionary definitions of “promote,” “further,” and “assist,” the court concluded: “The

⁴ That section provides, in relevant part, “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and *who willfully promotes, furthers,* [footnote continued on next page]

literal meanings of these critical words square[] with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity.” (*Id.* at p. 436.) We agree with this conclusion.

Based on the foregoing, we believe the evidence here, together with the reasonable inferences to be drawn therefrom, supports the jury’s true finding on the gang enhancement.

B. *Imposition of Three Years on the Gang Enhancement*

The trial court sentenced defendant to a total term of 53 years to life in state prison, consisting of an indeterminate term of 25 years to life for the murder, a consecutive indeterminate term of 25 years to life for the personal firearm use enhancement, and a consecutive upper determinate term of three years for the gang enhancement. Defendant asserts that the three-year consecutive term for the gang enhancement was unauthorized and must be replaced with a 15-year minimum parole eligibility requirement.

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or assists in any felonious criminal conduct by members of that gang, shall be punished” (§ 186.22, subd. (a), italics added.)

The relevant provisions of section 186.22, as it was in effect in 1999 when the murder occurred, are as follows: “(b)(1) Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court’s discretion. [¶] . . . [¶] (4) Any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.”⁵ (Stats. 1997, ch. 500, § 2.)

There is a conflict among the decisions in the Courts of Appeal as to the proper application of the gang enhancement where the defendant’s underlying crime is punishable by life in prison, as in this case. The Supreme Court acknowledged the conflict on this issue in the Courts of Appeal without addressing the question. (*People v. Montes* (2003) 31 Cal.4th 350, 362, fn. 15.) However, the issue is presently pending before the California Supreme Court in *People v. Lopez* (August 6, 2003, B161668) review granted November 12, 2003, S119294, and other cases.

⁵ These sections have since been renumbered and the determinate terms increased. Currently, the language describing the 15-year minimum parole eligibility period is found in paragraph (5) of section 186.22, subdivision (b). Paragraph (b)(4) was amended to prescribe specific enhancement terms for certain listed offenses, such as home invasion robbery and carjacking. (§ 186.22, subds. (b)(4), (b)(5).) We will refer to the subdivisions in effect in 1999.

In *People v. Ortiz* (1997) 57 Cal.App.4th 480, the court held that, since section 186.22, subdivision (b)(1) by its plain terms only applies “[e]xcept as provided in” subdivision (b)(4), only the minimum parole period under subdivision (b)(4) applies, not the determinate enhancement under subdivision (b)(1). (*Ortiz*, at pp. 485-486.) The court pointed out that there was nothing in the statute to suggest that the extended parole eligibility limitation period should be combined with an additional determinate term. (*Id.* at pp. 485-486.)

The court in *People v. Herrera* (2001) 88 Cal.App.4th 1353, however, found *Ortiz*’s reasoning did not apply when the life sentence imposed contained a requirement that the defendant serve a minimum of 25 years of his life sentence. (*Herrera*, at p. 1364.) Referring to section 190, which prescribes a term of 25 years to life as one of the possible sentences for first degree murder, *Herrera* states: “the 15-year statutorily adopted minimum term [in section 186.22, subdivision (b)(4)] is inconsistent with the 25-year minimum term [in section 190] chosen by the voters through the initiative process. We construe the language in section 186.22, former subdivision (b)(1) ‘[e]xcept as provided by paragraph (4)’ to mean that if paragraph (4) is inapplicable for any reason, then the one of the three determinate terms [of the section 186.22, subdivision (b)(1) enhancement] applies to the defendant.” (*Herrera*, at p. 1364.) *Herrera* upheld imposition of an enhancement of three years, pursuant to section 186.22, subdivision (b)(1), to the defendant’s 25-year-to-life term for first degree murder. (*Herrera*, at p. 1364.) The dissent in *Herrera* stated that the language of the statute clearly states that a defendant who receives a life sentence receives the 15-year minimum term instead of

the consecutive enhancement. (*Id.* at pp. 1368-1369.) As to the apparent inconsistency in imposing a 15-year minimum term upon a defendant sentenced to 25 years to life, the dissent stated that there was no statutory provision prescribing that the 15-year minimum had a mandatory effect. (*Id.* at pp. 1369-1370.)

In *People v. Harper* (2003) 109 Cal.App.4th 520, the defendant was sentenced to 25 years to life for first degree murder. (*Id.* at p. 522.) *Harper* agreed with the dissent in *Herrera* and held that the 15-year minimum parole eligibility term applied rather than an additional gang enhancement. (*Harper*, at p. 527.) The court reasoned that the 15-year minimum was subsumed in the 25-year minimum parole eligibility imposed for the underlying murder conviction. (*Ibid.*) The court struck the 10-year gang enhancement and ordered the abstract of judgment to reflect the “alternate penalty” of a 15-year minimum parole eligibility date. (*Ibid.*)

In *People v. Johnson* (2003) 109 Cal.App.4th 1230, the court distinguished *Herrera* and held that a defendant sentenced to 15 years to life for second degree murder should not suffer a consecutive gang enhancement because subdivision (b)(5) of section 186.22 applied instead. (*Johnson*, at pp. 1236- 1237.) The court stated that “*Herrera* is not on point because it involved a conviction for first degree murder and a minimum term that was longer than the 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5).” (*Id.* at pp. 1237-1238.) The *Johnson* court added that “[t]he 15-year minimum parole eligibility period . . . applies to all life sentences without qualification, and is imposed in lieu of the determinate enhancement . . . , not in addition to it.” (*Id.* at p. 1239.)

In the absence of guidance from the Supreme Court, we elect to follow *Ortiz*, *Harper*, and *Johnson*. Unlike the court in *Herrera*, we do not perceive any conflict between section 186.22, subdivision (b)(4) and section 190. Although section 186.22, subdivision (b)(4) requires at least a 15-year minimum parole period, it does not mandate consideration for parole after 15 years. Consequently, it does not conflict with the minimum 25-year parole period imposed by section 190.

Thus, a court can apply both section 186.22, subdivision (b)(4) and section 190 without doing violence to either. The end result is that the defendant is not eligible for parole for at least 25 years. Since section 186.22, subdivision (b)(4) applies, by its terms section 186.22, subdivision (b)(1) does not, and the determinate term called for in that provision should not be imposed.

Accordingly, we conclude defendant's sentence should be modified to impose a 15-year minimum parole period pursuant to section 186.22, subdivision (b)(4).

III

DISPOSITION

Defendant's sentence is modified to incorporate a provision that he not be paroled until a minimum of 15 calendar years have been served, pursuant to section 186.22, subdivision (b)(4). As modified, the judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.